UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AGRI PROCESSOR CO., INC.

and **Case No. 29-CA-27396**

LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS UNION

Emily DeSa, *Esq*., Counsel for the General Counsel
Patricia McConnell, Esq., Counsel for the Charging Party
Richard M. Howard, Esq., and Jeffery A. Meyer, *Esq*., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on April 25, 2006. The charge was filed on January 30, 2006 and the Complaint was issued on March 21, 2006. In substance, the Complaint alleged that after the Union had been certified by the Board, the Respondent has refused to bargain.

The Respondent's defense boils down to the claim that a majority of the people who voted in the election "were subsequently found to be illegal aliens" and therefore the election should be declared a nullity because **(a)** the Union never had a valid showing of interest and **(b)** the illegal aliens, comprising most of the voting unit were not legally permitted to work for the Company and therefore could not share a community of interest with those employees who legally could be employed.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Unfair Labor Practices

The Union filed its Petition for an election on August 24, 2005. On September 7, 2005, the parties executed a Stipulated Election Agreement that was approved by the Regional Director on September 8, 2005. The parties agreed that the unit was as follows:

> **Included**: All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators employed by the Employer at its facility at 5600 1st Avenue, Brooklyn, New York.
> **Excluded**: All managers, office and clerical employees, salesmen, truck drivers, guards and supervisors as defined in Section 2(11) of the Act.

The election was held on September 23, 2005 and the tally of ballots showed that 15 employees cast ballots for the Union and that five employees cast ballots against union representation. There was one challenged ballot but that was not determinative.

On September 30, 2005, the Employer filed timely Objections alleging that union representatives and/or agents engaged in conduct affecting the results of the election.

On November 10, 2005, the Regional Director issued a Report on Objections in which he overruled some but ordered that some other of the allegations to be sent to a hearing. To the extent that the Regional Director held that certain of the Objections were not meritorious, those conclusions were adopted by the Board on December 21, 2005.

On December 16, 2005, I issued a Decision on Objections wherein I overruled those Objections that were sent to a hearing. I recommended that the appropriate Certification be issued to the Union.

The Respondent filed Exceptions to my Decision, but on January 11, 2006, the Board, by its Associate Executive Secretary, dismissed the Exceptions because they were untimely filed.

On January 23, 2006, the Board issued a Certification of Representative to the Union.

The Union has made various demands for bargaining commencing on January 5, 2006 and continuing to date. The Respondent has refused to commence bargaining and indicated on the record that it would not do so.

At the hearing, I rejected the Respondent's defenses but permitted it to make an offer of proof. In essence, the Respondent offered to prove, (and offered exhibits in support of its contentions), that a majority of the employees who were employed at the time of the election had submitted to the employer social security cards, (along with Resident cards); and that upon a post election check at a Social Security Web site, the Respondent discovered that these individuals either did not have social security numbers or that the numbers that they had submitted to the employer did not match the numbers listed with the Social Security Administration. The Respondent therefore opines that this shows that these individuals were undocumented aliens, having no permission to work legally in the United States. When asked if the Respondent had any other proof of their status, the Respondent's Counsel said that he did not.

In my opinion, the Respondent reliance on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) is misplaced. In *Hoffman*, the Court merely held that the Board may not award backpay to undocumented workers because that would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." The Court did not hold that such individuals should not be construed to be employees within the meaning of the Act or that Employers could interfere with their Section 7 rights with impunity.

In *Concrete Form Walls, Inc*., 346 NLRB No. 80 (2006), the Board rejected the Employer's contention that it could legally discharge employees because they were undocumented aliens. The Board also held that these individuals were valid voters in a Board election. Finally the Board concluded that the mere fact that the Employer offered evidence to show that the employees' social security numbers did not match those in the Social Security Data Base, was not sufficient to show that they were illegally working in the country.

Conclusions of Law

1. By refusing to bargain with Local 342, United Food and Commercial Workers Union, the Respondent has violated Section 8(a)(1) & (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To insure that the bargaining unit employees will be accorded the services of their collective bargaining representative for the full period provided by law, I shall recommend that the initial one year period of certification commence on the date the Respondent commences to bargain in good faith with the Union. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785.

The General Counsel and the Charging Party request that the Board order the Respondent to pay for their legal expenses in contesting this case. They assert that this is justified because the Respondent's defenses are frivolous. Citing *Unbelievable Inc., d/b/a Frontier Hotel & Casino*, 318 NLRB 857 (1995). Without commenting on the Respondent's defenses, I note that the hearing in this case took less than an hour and that the preparation for the hearing would have amounted to the drafting of the Complaint, the copying of a number of documents and the reading of a few cases. I suspect that the total amount of time expended by either the General Counsel or the Charging Party's Counsel to litigate this case could not have amounted to more than several hours. Since, the legal expenses for this amount of time is essentially nominal, I do not think that an award of legal expenses would be justified.[1]

[1] Although Ms. McConnell's pay rate may or may not exceed the General Counsel's attorney, it is hard for me to imagine that the legal cost to the Union could be anything other than nominal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The Respondent, Agri Processor Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food & Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in the Brooklyn, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., May 12, 2006.

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Raymond P. Green
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with Local 342, United Food & Commercial Workers Union as the exclusive bargaining representative of our employees.

WE WILL NOT like or related manner interfere with restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

AGRI PROCESSOR CO., INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.